

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF HAWAII

3)
4 WAYNE BERRY,) CV 01-00446 SPK-LEK
5)
6 Plaintiff,) Honolulu, Hawaii
7 vs.) March 5, 2003
8) 9:00 A.M.
9 FLEMING COMPANIES, INC.,)
10 et al.,) Settling of Instructions
11)
12 Defendants.)
13)

14 PARTIAL TRANSCRIPT OF JURY TRIAL
15 BEFORE THE HONORABLE SAMUEL P. KING
16 UNITED STATES DISTRICT JUDGE

17 APPEARANCES:

18 For the Plaintiff: TIMOTHY J. HOGAN, ESQ.
19 Lynch Ichida Thompson Kim
20 & Hirota
21 First Hawaiian Tower
22 1132 Bishop St., Ste. 1405
23 Honolulu, HI 96813
24 For the Defendant LEX R. SMITH, ESQ.
25 Fleming Companies, Inc.: ANN C. TERANISHI, ESQ.
Kobayashi Sugita & Goda
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Official Court Reporter: Debra Kekuna Chun, RPR, CRR
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26 Proceedings recorded by machine shorthand, transcript
27 produced with computer-aided transcription (CAT).

EXHIBIT **G**

1 WEDNESDAY, MARCH 5, 2003 9:39 O'CLOCK A.M.

2 (In open court without the jury:)

3 THE CLERK: Civil 01-00446 SPK, Wayne Berry
4 versus Fleming Companies. This hearing has been called
5 for Objections to the Jury Instructions.

6 Counsel, your appearances for the record,
7 please.

8 MR. HOGAN: Timothy Hogan on behalf of the
9 plaintiff Wayne Berry, who is also present.

10 MR. SMITH: Lex Smith and Ann Teranishi for
11 Fleming. Ralph Sussi is also present from Fleming
12 Companies.

13 THE COURT: We have a proposed special verdict
14 form, and the insertion of the exhibit numbers, that's not
15 objectionable. 221, 222, 223.

16 MR. HOGAN: That's acceptable, Your Honor.

17 THE COURT: Now we come to the word "purchased"
18 in paragraph 2 of each of the A, B, C verdict forms,
19 referring to different software systems. And I've changed
20 the word "purchased" to "had" in each case. You want to
21 be heard about that?

22 MR. HOGAN: Yes. I think probably just on the
23 issue -- I understand the court is inclined to go this
24 way. Because the use of "had" gives it a past tense, Your
25 Honor, that at least we're talking about current use. And

1 I believe that they have to have it; so I think it should
2 be "has."

3 And that's relevant, Your Honor, on the issue of
4 rescindment. If it was rescinded, which we will attempt
5 to argue to the jury, they don't have one, but they did --
6 they had one once. So for that purpose I think that, if
7 we can just agree that it goes to "has," then we're not
8 knocking out rescission as one of the things we can argue
9 to the jury effectively.

10 THE COURT: That it "has"?

11 MR. HOGAN: "Has," Your Honor. So if it lost
12 it, it no longer has it.

13 THE COURT: Have?

14 MR. HOGAN: But something that would make it not
15 past tense that would essentially say -- the jury could be
16 confused thinking, well, they had one during the period of
17 time that the EULA was alive.

18 THE COURT: Want to change "had" to "has"?

19 MR. SMITH: No objection, Your Honor.

20 THE COURT: Okay. We'll make it "has" in each
21 case.

22 Now, in -- also as to each section of the
23 verdict form relating to software, I've stricken what was
24 question number 4, "Was the infringement of the freight
25 control software copyright willful? Yes. No. Go to the